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No. 93-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GREATER ROCKFORD ENERGY
AND TECHNOLOGY CORP., *et al.*,

Petitioners,

vs.

SHELL OIL CO., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether an antitrust claim is properly dismissed on summary judgment where, in the face of unrebutted evidence negating causation, a plaintiff fails to offer any evidence that an alleged violation was a material cause of the claimed injury?

RULE 29.1 LISTING

Respondents' listing pursuant to Rule 29.1 appears in Appendix A, at pages A-1 to A-9 below.

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Respondents respectfully request that the Court deny the Petition For Writ Of Certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

In this antitrust action, petitioners, plaintiffs below, are eleven manufacturers of ethanol, a type of alcohol made from grain or molasses, and two manufacturers of gasohol, an automobile motor fuel manufactured from gasoline and ethanol. Petition at 4. Respondents, defendants below, are eight oil companies

engaged, *inter alia*, in the refining and marketing of automotive fuel. *Id.*

Plaintiffs charged defendants with conspiring in violation of Sherman Act § 1, 15 U.S.C. § 1 (1990), to discourage, by advertisements, public statements and otherwise, consumers from making retail purchases of gasohol. The Court of Appeals, in a unanimous opinion by Judge Cudahy, held that plaintiffs failed to tender evidence of any such conspiracy in opposition to summary judgment; and plaintiffs have now abandoned the Sherman Act § 1 claim.[1] Petition at 3. Plaintiffs also alleged that defendants individually restrained the retail motor fuel market in violation of the Gasohol Competition Act of 1980, 15 U.S.C. § 26a (1988) (the "GCA"), by discouraging their branded franchise dealers from selling gasohol and consumers from buying it.[2] Petition at 5-6.

Plaintiffs did not participate in the allegedly restrained retail motor fuel market. Indeed, the ethanol manufacturer plaintiffs were suppliers of a raw material to gasohol manufacturers, who in turn sold to distributors. Nonetheless, plaintiffs claimed to have suffered their business failures "by reason of" the defendants' alleged unilateral violations of the GCA.

After extensive discovery, defendants amassed a substantial record to support summary judgment. The record included *undisputed admissions* by plaintiffs and their experts that plaintiffs' ethanol and gasohol sales were devastated by numerous

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[1] The Court of Appeals held that "there is no evidence of concerted action." Petition, Appendix A at 9a. Plaintiffs do not challenge that holding. Accordingly, plaintiffs' continued assertion that the record shows that defendants acted in concert (Petition at 5) should be ignored.

[2] Plaintiffs baldly misstate the record by asserting that the Court of Appeals found that the defendants had committed *per se* violations of the GCA. *See* Petition at 7. The court merely concluded that there was a genuine issue of fact as to whether any such violation had occurred. Petition, Appendix A at 13a-14a.

economic and market factors unrelated to any alleged antitrust violation. Those undisputed factors included:

- the many automobile owner's manuals that warned consumers against the use of motor fuels containing alcohol;[3]
- media reports that discouraged the use of alcohol-blended motor fuels;
- state pump labeling laws that hurt ethanol and gasohol sales, which one of plaintiffs' experts testified "'killed ethanol in the marketplace;'"
- the elimination or reduction in state tax exemptions for gasohol sales, which reduced the prices paid to plaintiffs for gasohol and ethanol;
- a drop in gasoline prices, which led to a corresponding drop in gasohol and ethanol prices (from $1.56 to $0.97 per gallon according to one plaintiff);
- a federal subsidy that effectively reduced the raw material costs of some plaintiffs' competitors by forty percent;
- the elimination of a $1.40 per gallon incentive for ethanol production in the state where four of the ethanol producer plaintiffs were located; and
- the admitted ability of plaintiffs' much larger competitors to produce better quality ethanol at a lower price than any of the plaintiffs.

Petition, Appendix A at 19a-23a.

It was also undisputed that only approximately one-half of the roughly 150,000 retail automotive fuel outlets in the United States were branded outlets supplied by defendants, and thus

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[3] Plaintiffs' assertion that "[a]utomobile manufacturers have indicated that using gasohol will not affect new car warranties" (Petition at 4) is accordingly misleading.

could have been affected by defendants' alleged dealer restrictions.[4] Moreover, plaintiffs did not proffer in opposition to summary judgment any evidence that they ever attempted to sell ethanol or gasohol to any defendant's dealer or jobber, but were unable to do so, due to any practices of the defendant. Indeed, in response to requests to admit served by some defendants, plaintiffs admitted that they could not identify any lost sales to defendants' dealers or jobbers.[5]

The district court granted defendants' motion for summary judgment on the ground that plaintiffs lacked standing under Clayton Act § 4, applying the multi-factor analysis announced in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Petition, Appendix B at 57a-63a. In a thorough opinion, the Court of Appeals unanimously affirmed summary judgment dismissing plaintiffs' claims on the ground that plaintiffs had failed to raise any genuine issue that they could prove the essential causation-in-fact element of a claim for treble damages under Clayton Act §4.[6] The court held that plaintiffs could not prove that any

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[4] *See* Defendants-Appellees' Appendix, filed in the Seventh Circuit on September 11, 1992, at A147-154. Plaintiffs misstate that defendants' alleged conduct "excluded gasohol from the existing motor fuels network." Petition at 6. The undisputed record established that four of the eight defendants marketed alcohol-blended fuel, another owned an ethanol production plant, and nationwide sales of ethanol for fuel increased from 20 million gallons per year to 825 million gallons per year over the decade ending in 1987, a 4000 percent increase. Petition, Appendix A at 7a-8a and 9a.

[5] Defendants-Appellees' Appendix at A101-104 and A106-107.

[6] The court treated the causation-in-fact requirement as a sub-element of plaintiffs' need to prove "antitrust injury." Petition, Appendix A at 6a and 18a. Plaintiffs concede that this is an appropriate way to view the requirement. Petition at 16 ("the notion of causation is implicit in the antitrust injury standard, which requires that the injury 'flow[] from' that which makes defendant's acts unlawful," quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Similarly, as plaintiffs note, distinguished antitrust commentators have observed that it is often pointless to attempt to distinguish causation-in-fact from antitrust injury. Petition at 16-17 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 334.3a (Supp. 1991)). But

(Footnote continued)

alleged violation was a "material and substantial factor causing their alleged injuries." Petition, Appendix A at 19a. Having concluded that plaintiffs could not even show causation-in-fact, the court found it unnecessary to reach the question whether, assuming an injury caused in fact by an alleged violation, plaintiffs had standing to sue.[7] Petition, Appendix A at 23a. Plaintiffs' suggestion for rehearing *en banc* was denied with no judge having called for a vote.

The Court of Appeals' decision does not merit review by this Court. The decision is a straightforward application of the well-settled rule for proof of causation in antitrust cases. The Court of Appeals held that plaintiffs failed to show that the alleged violation was a material element of, and a substantial factor in producing, the alleged injury. Petition, Appendix A at 18a-19a. In so holding, the court noted that plaintiffs had failed to show that "'but for' the alleged antitrust violation [they] would not have suffered the injuries of which they complain." Petition, Appendix A at 23a. The court's statement is fully in accord with the decisions of this Court and not in conflict with the other circuits. This Court recently has reaffirmed that an antitrust plaintiff must show that "the defendant's violation was a 'but for' cause of his injury." *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317 (1992).

Plaintiffs' attempt to manufacture a conflict is based upon a mischaracterization of the rule for proof of causation and the Court of Appeals' application of it. Indeed, the Court of Appeals applied the very same legal standard that plaintiffs argue for and that was applied in cases that plaintiffs offer in support of their claim of circuit conflict – namely, whether the

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whether the need to prove causation-in-fact is so viewed or viewed as a distinct element of proof separate from "antitrust injury," plaintiffs' failure to prove causation-in-fact is equally fatal to their claims.

[7] Relying on *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986), the Court of Appeals sustained summary judgment dismissing plaintiffs' claims for injunctive relief because of their failure to show that any conduct by defendants was the cause-in-fact of any actual or threatened injury. *See* Petition, Appendix A at 23a.

antitrust plaintiff established "that the violation was a material element of, and substantial factor in producing, the injury." Petition, Appendix A at 18a. Accordingly, the Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE SETTLED RULE FOR PROOF OF CAUSATION-IN-FACT IN ANTITRUST CASES

A. The Settled Material Cause Rule Of Antitrust Causation Requires The Plaintiff To Prove That The Violation Was A "But For" Cause Of His Injury

Section 4 of the Clayton Act permits a plaintiff to sue for damages only when he has suffered injury to his business or property "by reason of" a violation of the antitrust laws. 15 U.S.C. § 15(a) (1988). The "by reason of" language of Section 4 imposes two distinct causation requirements. First, a plaintiff must prove that his injury was caused in fact by the antitrust violation. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Second, a plaintiff must prove that the relationship between the violation and the injury is of a type, and sufficiently direct and non-speculative, to make the plaintiff a proper party to sue. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-46 (1983).

The Petition involves only the first of these requirements — cause-in-fact. To satisfy this requirement, as the Court said in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), a plaintiff must show that the illegality is "*** a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."

More recently, this Court explained that this material cause test requires an antitrust plaintiff to show that the violation was

a "but for" cause of his injury. Interpreting the analogous causation requirement of the private treble damage remedy under RICO, the Court stated that it had held in *Associated General Contractors*

> "**** that a plaintiff's right to sue under § 4 required a showing not only *that the defendant's violation was a 'but for' cause of his injury*, but was the proximate cause as well."

Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317 (1992) (emphasis added).[8]

Likewise, in *Blue Shield v. McCready*, 457 U.S. 465 (1982), the Court used the words "but for" to describe the cause-in-fact requirement that an antitrust plaintiff must satisfy even before the court addresses the plaintiff's standing. The Court said: "We therefore assume, as McCready has alleged, that but for the alleged conspiracy to deny payment, she would have been reimbursed by Blue Shield for the cost of her psychologist's services." 457 U.S. at 468 n.2.

While the Court did not use the words "but for" in *Zenith*, its analysis implicitly recognized that "but for" causation was necessary to establish that a violation was a material cause of injury compensable under Clayton Act § 4. The Court first concluded that Zenith had created a triable issue as to injury with evidence tending to show that it would not have suffered its injury but for defendants' illegal Canadian patent pool:

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[8] The *Holmes* Court elsewhere reiterated, by citation to *Associated General Contractors*, that proof of causation-in-fact in an antitrust case requires proof of "but for" causation. The Court said of the RICO counterpart to § 4:

> "This language can of course be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury. *Cf. Associated General Contractors of Cal., Inc. v. Carpenters* [citation omitted]. ***"

Holmes, 112 S. Ct. at 1316 (footnote omitted).

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. *** The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed. ***"

395 U.S. at 124-25. The Court then affirmed a directed verdict for defendants on Zenith's claim of injury from defendants' British and Australian patent pools. The Court reasoned that there was inadequate evidence that Zenith ever intended or was prepared to enter the British and Australian markets and therefore that Zenith could not prove an injury it would not have suffered but for the British and Australian patent pools. *See* 395 U.S. at 125-29.

The Seventh Circuit in this case and other Courts of Appeals have recognized that the material cause standard requires a plaintiff to prove that the harm would not have occurred "but for" the alleged violation. *See, e.g., Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) ("[t]he case law is clear, moreover, that the treble-damage plaintiff may not recover for losses due to factors other than the defendant's anticompetitive violations"), *cert. denied*, 113 S. Ct. 1048 (1993); *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986) ("an essential element in plaintiffs' claim is that the injuries alleged would not have occurred *but for* [defendant]'s antitrust violation") (emphasis in original), *cert. denied*, 479 U.S. 1088 (1987);[9] *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92,

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[9] *Argus* was not superseded by *Irvin Industries, Inc. v. Goodyear Aerospace Corp.*, 974 F.2d 241 (2d Cir. 1992), as plaintiffs suggest. *See* Petition at 12. In *Irvin Industries*, the Second Circuit concluded that the plaintiff, unlike the *Argus* plaintiff, did create a genuine issue that it would not have lost a contract bid but for the defendant's unlawfully low bid. 974 F.2d at 245-46.

95 (3d Cir.) (recognizing that *Associated General Contractors* requires proof of "causation in this but-for sense," as well as antitrust standing), *cert. denied*, 479 U.S. 821 (1986); *Southwestern Sheet Metal Works, Inc. v. Semco Mfg., Inc.*, 788 F.2d 1144, 1147 (5th Cir. 1986) (granting directed verdict on claim that plaintiff lost bids due to defendants' conspiracy to restrain labor wages because "[n]ot one instance is presented where, but for [defendant]'s wage advantage, [plaintiff] would have won or was likely to have won" a bid), *cert. denied*, 480 U.S. 917 (1987); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 719 (11th Cir. 1984) (affirming summary judgment because "[p]laintiff has not shown that alternative sources of comparable products would have been available but for the alleged [tying agreement]"); *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411, 412 and 415 n.4 (4th Cir. 1982) (affirming judgment for defendants and noting that directed verdict would have been proper because plaintiff failed to show its "profits would have been even greater but for the anticompetitive conduct"); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980) (affirming dismissal where plaintiff conceded that absent Sherman Act violations it would still have been out of business); *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1322 (9th Cir. 1975) (stating that on remand "[p]laintiff, of course, must prove that it would have purchased the mill but for the contract" which plaintiff claimed excluded it from the market), *cert. denied*, 423 U.S. 1053 (1976); *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1016 (5th Cir.) (at trial after remand plaintiffs "must sustain the burden of proving that but for the allegedly unlawful practices of [defendant] vis-a-vis [defendant]'s franchisees, the plaintiffs would have done a certain amount of business with the franchisees"), *cert. denied*, 409 U.S. 1086 (1972).[10]

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[10] These circuit court decisions articulating the causation requirement in terms of "but for" cause are not in conflict with decisions of the same courts, cited by plaintiffs, articulating the causation requirement in terms of material cause. *See* Petition at 11-12. As the antitrust causation decisions of this Court teach, the "but for" and material cause standards are not at odds with one another. *See* pages 6-8, above.

(Footnote continued)

Hence, under the settled rule for proof of causation-in-fact in antitrust cases under Clayton Act § 4, a plaintiff must prove that an alleged violation is a material cause of his injury. He need not show that the violation was the sole cause of injury. However, a plaintiff cannot establish that an alleged violation is a material cause unless he can show that the injury would not have occurred "but for" the alleged violation. As demonstrated below, the Court of Appeals' decision is a straightforward and correct application of this rule.

B. The Court Of Appeals' Decision Is A Straightforward And Correct Application Of The Settled Causation Rule

Relying expressly on this Court's decision in *Zenith*, the Court of Appeals correctly stated the rule for proof of causation-in-fact. It said that

> "* * * a § 4 plaintiff must show that its injury 'flows from that which makes defendants' acts unlawful,' * * * — that 'but for' the alleged violation, the injuries would not have occurred. * * * *An antitrust violation need not be the sole cause of the alleged injuries, but the plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury.* * * *"

Petition, Appendix A at 18a (citations omitted, emphasis added).

The Court of Appeals then applied that rule to affirm summary judgment for defendants. The Court held:

> "Defendants identify numerous intervening economic and market factors which they argue may have been the actual cause of the plaintiffs' injuries.

The only anomalous circuit court case is *Allied Accessories & Auto Parts Co. v. General Motors Corp.*, 901 F.2d 1322, 1325-26 (6th Cir. 1990). There, the Sixth Circuit erroneously equated a "but for" cause test with a sole cause test. *See* pages 11-13, below. That error by that court is at odds with this Court's analysis and cannot provide any support for reviewing the Seventh Circuit's decision correctly applying this Court's analysis.

> They contend that the alleged antitrust violations played an insignificant role (or none at all) in the plaintiffs' economic woes, and that therefore no reasonable trier of fact could find that the violation *caused* the plaintiffs' injuries. We agree and find that *as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries.* Hence, the plaintiffs did not suffer antitrust injury."

Petition, Appendix A at 19a (latter emphasis added). This holding represents a straightforward, case-specific evaluation of the voluminous record in this case. Based on its careful analysis, the court concluded that plaintiffs had failed to show that "but for" the alleged violation, plaintiffs would not have suffered the injuries claimed. *Id.* at 23a. This straightforward application of a settled rule of law does not provide any ground for granting the Petition.

II.

THE PETITION OFFERS NO REASON TO DEPART IN THIS CASE FROM THE SETTLED CAUSATION RULE

A. The Petition Incorrectly Argues Both That "But For" Cause Is The Same As Sole Cause And That The Court Of Appeals Applied A Sole Cause Requirement

In an effort to portray the Seventh Circuit's decision as out of line with the decisions of this Court and other Courts of Appeals, the Petition mischaracterizes both the settled rule for proof of causation-in-fact and the Seventh Circuit's application of that rule. Plaintiffs' mischaracterization of the causation rule centers on their treatment of "but for" cause. Once the mischaracterization is laid bare of its rhetorical trappings, it plainly provides no basis for review of the Seventh Circuit's decision.

Plaintiffs repeatedly assert that the material cause rule, which they concede controls in antitrust cases, is entirely distinct from

"but for" cause. Petition at 9, 10-12 and 14. In unrestrained rhetoric, plaintiffs repeatedly refer to the "but for" cause requirement as a novelty created for the first time in the Seventh Circuit's decision. *E.g.*, Petition at 3-4 ("entirely unprecedented requirement"), 8 ("radically rewrites the standards for proving causation"), 9 ("[t]his new standard"), 18 ("radically new standard"). Having rhetorically separated "but for" cause from material cause, plaintiffs then equate "but for" cause with sole cause, and conclude that any reliance on a "but for" standard would be at odds with the unquestioned proposition that a plaintiff need not prove that a violation is the sole cause of an injury. *See* Petition at 13-14.

Plaintiffs are wrong on both counts. This Court, followed by the Courts of Appeals, clearly has used the concept of "but for" cause to define the material cause standard, and has not equated "but for" with sole cause. As shown above, this Court said in *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311, 1317 (1992), explaining its earlier holding in *Associated General Contractors*: "we held that a plaintiff's right to sue under § 4 required a showing *** that the defendant's violation was a 'but for' cause of his injury ***."[11]

Nor, contrary to plaintiffs' suggestion, did the Court of Appeals hold in this case that plaintiffs had to show the alleged violation to be the sole cause of their business failure. On the contrary, the Court of Appeals expressly stated that plaintiffs did not have such a burden. Petition, Appendix A at 18a ("[a]n antitrust violation need not be the sole cause of the alleged

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[11] The Court did not find "but for" causation analysis inapplicable to antitrust cases in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981), as plaintiffs suggest. *See* Petition at 20. In that case, the Court explained that some latitude is allowed antitrust plaintiffs in proving the amount of damages because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." 451 U.S. at 566. But to be permitted such latitude in proving the amount of damages, the Court held that the plaintiff first "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." 451 U.S. at 562.

injuries***").[12] Relying expressly on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), the Court of Appeals concluded that plaintiffs had failed to raise a genuine issue that any alleged violation was a material cause of plaintiffs' business failures. Petition, Appendix A at 18a-19a. Indeed, the causation rule applied by the Court of Appeals in this case in substance tracks the language of cases that plaintiffs offer in support of an alleged circuit conflict – namely, that the alleged antitrust violation must be a material element of, and substantial factor in producing, plaintiffs' injury. *See* Petition at 11-12 (quoting cases).

B. The Petition Ignores Plaintiffs' Failure To Proffer Any Evidence Sufficient To Meet Their Burden Of Proving Causation Under Any Standard

Plaintiffs misleadingly assert that the Court of Appeals held that "a defendant can win summary judgment by filling the record with sufficient evidence hypothetically favorable to its defenses, whatever showing plaintiff makes." Petition at 21. The Court of Appeals did no such thing. Instead, the court explicitly ruled that the plaintiffs failed to make any showing that would satisfy the material cause test: "We *** find that as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries." Petition, Appendix A at 19a. The Court of Appeals so ruled because plaintiffs failed to make any showing that an alleged violation even contributed to their business failures.

The record before the court contained repeated *admissions* by plaintiffs and their experts, and other *uncontroverted proof*, that plaintiffs' ethanol and gasohol sales were severely diminished, and their failures caused, by eight factors unrelated to

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[12] Plaintiffs' assertion that the courts have "regularly rebuffed the type of analysis adopted by the Seventh Circuit" (Petition at 13) rests on the mischaracterization of the decision as applying a sole cause analysis. None of the cases cited by plaintiffs in any way rejects the application of the material and "but for" cause analysis applied in this case.

any alleged antitrust violation, described in the court's opinion. Petition, Appendix A at 19a-23a. The proof of the impact on plaintiffs' businesses of the market factors upon which the court relied was not merely "hypothetically favorable" to defendants: *it was admitted by plaintiffs*. Plaintiffs therefore were required to proffer evidence, in addition to proof of a violation of law, sufficient to create a genuine issue that they suffered some injury from an antitrust violation as opposed to the other admitted factors.[13] Plaintiffs could not merely rest on proof of an alleged violation without additional evidence of causation. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Plaintiffs proffered no such evidence.[14] They were afforded every opportunity to marshal whatever facts they believed would support their claims. Because the summary judgment record was so one-sided, the Seventh Circuit properly concluded that the plaintiffs had not created a genuine issue that an alleged antitrust violation as opposed to other factors was a material or "but for" cause of their diminished sales. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (summary judgment appropriate where evidence "is so one-sided that one party must prevail as a matter of law"); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts").

None of the cases plaintiffs cite holds that summary judgment is inappropriate where the defendants have proffered such a compelling record of other explanations for the plaintiffs' injuries. To the contrary, courts repeatedly have granted summary

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[13] A plaintiff bears the burden of proving that it suffered some material injury from an antitrust violation. *E.g.*, *Zenith*, 395 U.S. at 114 n.9. To survive summary judgment, the plaintiff must present evidence sufficient to create a genuine issue on such elements on which it bears the burden of proof. *See, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[14] Plaintiffs assert that the court's decision conflicts with *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992). Petition at 21. But that case did not even discuss causation-in-fact. There, the Court simply found that plaintiffs provided evidence of a tying arrangement and monopolization sufficient to withstand summary judgment.

judgment based on such a record. *E.g.*, *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1495-97 (8th Cir. 1992) (deposition testimony plaintiffs presented failed to create genuine issue sufficient to rebut admissions by plaintiffs and their experts that plaintiffs' decline resulted from other factors), *cert. denied*, 113 S. Ct. 1048 (1993); *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41-46 (2d Cir. 1986) (testimony proffered by plaintiffs failed to create genuine issue adequate to rebut evidence showing alternative causes for plaintiffs' alleged injuries), *cert. denied*, 479 U.S. 1088 (1987); *Jayco Systems, Inc. v. Savin Business Machines Corp.*, 777 F.2d 306, 313-16 (5th Cir. 1985) (affidavit submitted by plaintiff did not create genuine issue sufficient to rebut substantial evidence that plaintiff was not injured by antitrust violations), *cert. denied*, 479 U.S. 816 (1986).[15]

Thus, when one strips away plaintiffs' mischaracterization of the Court of Appeals' decision and their manufactured circuit conflict, this case involves nothing more exceptional than a case-specific application of the well-settled rule that summary judgment is appropriate where the non-moving party sits back silent and idle in the face of uncontroverted proof that negates, as a matter of law, an essential element of the cause of action. *See*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Such an issue is not worthy of review by writ of certiorari.

C. The Petition Cites No Policy Supporting Abandonment Of The Settled Causation Rule

Plaintiffs finally suggest that this Court should abandon "but for" cause as a standard giving content to the material cause

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[15] Courts similarly have directed verdicts for the defendant based on evidence of other explanations for the plaintiff's alleged injuries. *E.g.*, *Morgan v. Ponder*, 892 F.2d 1355, 1361-63 (8th Cir. 1989) (cited at Petition 13) (reversing denial of directed verdict because plaintiffs' evidence of injury from alleged predatory pricing was inadequate as a matter of law to rebut evidence that plaintiffs failed for other reasons); *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 792-94 (5th Cir. 1983) (affirming directed verdict against plaintiff because plaintiff's proffered testimony was inadequate to rebut defendants' demonstration that plaintiff's decline was caused by other factors); *Federal Prescription*

(Footnote continued)

rule in antitrust cases, for two reasons. Neither of these arguments is supported by policy considerations.

First, plaintiffs claim that the Court of Appeals' decision makes the GCA unenforceable. Petition at 9-10. But the Court of Appeals' decision does not impair enforcement of the GCA or any other antitrust law. Any private plaintiff with standing who, unlike these plaintiffs, can raise a genuine issue of fact that he suffered harm "by reason of" a violation can sue. The Government also may "institute proceedings in equity to prevent and restrain such violations." 15 U.S.C. § 25 (1988).

Second, plaintiffs assert that the issue of antitrust causation in markets is more complicated than the issue of causation of injury by other torts, to which plaintiffs concede a "but for" cause test generally applies, because "there is typically more than one cause for any market event." Petition at 20. But the same holds true for injury attributable to other torts. As the leading commentator observes: "[t]he event without millions of causes is simply inconceivable." W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984). Plaintiffs' reliance on the section of *Prosser and Keeton* dealing with the "one type of situation" where either of two causes, operating alone, is sufficient to cause the identical result, is misplaced. Petition at 19. First, as discussed above, plaintiffs offered no evidence on causation, much less evidence sufficient to show that an alleged violation operating alone was sufficient to cause their injury. There thus is no basis to determine that this is such a situation. Second, even assuming that this were such a situation, Prosser and Keeton merely argue that a court should require that the violation be "a material element and a substantial factor in bringing" about plaintiff's injury. *Prosser and Keeton* § 41, at 267. As also discussed above, this is the very test that the Court of Appeals applied here.

Service, Inc. v. American Pharmaceutical Association, 663 F.2d 253, 269 (D.C. Cir. 1981) (dismissing award of damages because "[o]n the basis of this evidence we think it too speculative to find that [defendant] was responsible for [plaintiff]'s extraordinary forgery checking expenses, given the availability of alternative explanations for those expenses"), *cert. denied*, 455 U.S. 928 (1982).

Plaintiffs' mischaracterizations do not provide any basis for review of the Court of Appeals' decision that they could not, as a matter of law, satisfy the causation requirement of Clayton Act § 4.[16]

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Dated: January 14, 1994.

Respectfully submitted,

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[16] Plaintiffs also argue that the Court of Appeals erred in dismissing plaintiffs' claims for injunctive relief under Clayton Act § 16, 15 U.S.C. § 26 (1988). Petition at 21-22. But because plaintiffs failed to create a genuine issue that they were injured by any alleged antitrust violation, and proffered no evidence suggesting that they might be so injured in the future, they could not satisfy the requirement of "threatened loss or damage" necessary for relief under Clayton Act § 16. *See* Petition, Appendix A at 23a.

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APPENDIX

APPENDIX A

RULE 29.1 LISTING

The defendant-appellees below, who are respondents herein, have the following parent companies and subsidiaries (except wholly owned subsidiaries).

Respondent Atlantic Richfield Company has no parent company. Atlantic Richfield Company has the following subsidiaries (except wholly owned subsidiaries): 85819 Canada Limited; A.C.E. Insurance Company (Bermuda), Ltd.; AGRO International, S. de R.L. de C.V.; Alyeska Pipeline Service Co.; AM/PM Comestiveis Ltda.; AM/PM Japan; ARCO Algeria, Inc.; ARCO Chemical (Malaysia) SDN, BHD.; ARCO Chemical Bahamas, Ltd.; ARCO Chemical Company; ARCO Chemical Taiwan Co., Ltd.; ARCO Solar Nigeria Ltd.; ARCO/JSP de Mexico; Atlantic Richfield Kalosi Ltd.; Badger Pipe Line Co.; Black Lake Pipe Line Co.; Blair Athol Coal Pty., Ltd.; Cia S. Paulo Distrib.; Colonial Pipeline Co.; Compania de Petroleo Ganso Axul, Ltda.; Cook Inlet Pipe Line Co.; Dalrymple Bay Coal Terminal Pty., Ltd.; Dixie Pipeline Co.; East Heidelberg Salt Water Disposal Co.; East Texas Salt Water Disposal Co.; Empresa de Transportes Jober Ltda.; Empresas Lanzagorta, S.A. de C.V.; Greater Pacific Ltd.; International Tanker Indemnity Association, Ltd.; Iricon Agency Ltd.; Kenai Pipe Line Co.; Kuparuk Transportation Capital Corp.; Logan Aluminum, Inc.; Lyondell Petrochemical Corp.; MTC ARCO, Inc.; New Cure, Inc.; Nihon Oxirane Co., Ltd.; Oil Casualty Insurance Ltd.; Oil Insurance Ltd.; Olympic Pipe Line Co.; Platte Pipe Line Co.; PT Gema Polytama Kimia; Steamelee B.V.; Tecumseh Pipe Line Co.; Texas-New Mexico Pipe Line Co.; Transac S.A.-Transporte Rodoviario; Transbase S/A; Transcola S.A.; Transcom-Transporte Combustivel S/A; Transka S.A.-Transportes; Translini S.A.; Transportadora Andrade S/A; Transportadora Aparecida do Norte S/A; Transportes Brios S/A.

The parent corporations of respondent Amoco Oil Company are Amoco Corporation and Amoco Company. Amoco Oil Company has no subsidiaries that are not wholly owned.

The parent corporations of respondent BP America Inc. are BP America Holdings Limited, BP International Limited and

British Petroleum Company p.l.c. BP America Inc. has no subsidiaries that are not wholly owned.

The parent corporation of respondent Chevron U.S.A. Inc. is Chevron Corporation. Chevron U.S.A. Inc. has the following subsidiaries (except wholly owned subsidiaries): Atlas Supply Company; Chevron do Brasil Ltda.; Compania Minera Chevron Dominicana, S.A.; Felix Oil Company; Horizon Resources Corporation; and Pembroke Capital Company Inc.

Respondent Exxon Company, U.S.A. is a division of Exxon Corporation. Exxon Corporation has the following subsidiaries (except wholly owned subsidiaries and subsidiaries in which Exxon Corporation has less than a five percent interest): 151742 Canada Inc.; 165550 Canada Limited; 172965 Canada Limited; 177003 Canada Inc.; 2849518 Canada Limited; 571269 Alberta Limited; 571270 Alberta Limited; AGA Progas a.s.; AT&S Exploration Ltd.; Abu Dhabi Petroleum Company Limited; Ace Polymer Co., Ltd.; Acquifund Resources Limited; Aditivos Orinoco, C. A.; Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung; Advanced Elastomer Systems Do Brasil Ltda.; Advanced Elastomer Systems Japan Limited; Advanced Elastomer Systems Limited; Advanced Elastomer Systems Marketing Pte. Ltd.; Advanced Elastomer Systems NV/SA; Advanced Elastomer Systems Singapore Pte. Ltd.; Advanced Elastomer Systems, Canada, Inc.; Advanced Elastomer Systems, Inc.; Advanced Elastomer Systems, L.P.; Air Tankdienst Koeln GbR; Aircraft Fuel Supply B. V.; Aishin Sekiyu K. K.; Al-Jubail Petrochemical Company, Alberta Products Pipe Line Ltd.; Alyeska Pipeline Service Company; AquaAir Environmental, Inc.; Aramco Services Company; Asakawa Sekiyu K.K.; Awaji Gas Nenryo Kabushiki Kaisha; Azuma Sekiyu K.K.; B.W.O.C., Inc.; BEB Erdgas und Erdoel GmbH, Hannover; BRIGITTA Erdgas und Erdoel GmbH, Hannover; Bangkok Aviation Fuel Services Limited; Banshu Ekika Gas K.K.; Bayerische Erdoelleitung G.m.b.H.; Beaverhill Resources Limited; Brickwood Holdings Pty. Ltd.; Bryan Austin Chalk Operating Committee, Inc.; Bryan Woodbine Gathering, Inc.; Canadian Reserve Oil & Gas Ltd.; Cascade Fertilizers (1990) Limited; Castle Peak Power Company Limited; Changi Airport Fuel Hydrant Installation Pte. Ltd.; Changi

Into-Plane Services (Pte) Ltd.; Chuo Sekiyu Hanbai K.K.; Clermont Coal Mines Limited; Comcor Chemicals Limited; Compagnie Industrielle des Polyethylenes de Normandie, GIE(CIPEN); Compania Minera Disputada de Las Condes S.A.; Comptoir Auxiliaire du Petrole; Comptoir Oyonnaixien des Combustibles (C.O.C.); Computer Centrum Groningen B.V.; Copim St. Lawrence Ltd.; Crandon Mining Company, a Winsconsin partnership; Cynthia Gas Gathering Company Limited; DFTG Deutsche Fluessigerdgas Terminal GmbH; Daihatsu Sekiyu K.K.; Daito Gas K.K.; Depot Petrolier du Gresivaudan; Depots Petroliers de la Corse; Depots de Petrole Cotiers; Deudan-Holding GmbH; Deutsche Advanced Elastomer Systems GmbH; Deutsche Erdgas Transport G.m.b.H.; Deutsche Transalpine Oelleitung G.m.b.H.; Devon Estates Limited; Dexco Polymers (General Partnership); Disma S.r.l.; Dixie Pipeline Company; Dunbar Oil Ltd.; E S F Limited; ESSO OIL Tankstellen Gesellschaft m.b.H.; ETD Tankdienst Gesellschaft Duesseldorf GbR; Eagle Kenso K.K.; Eable Reinsurance Co. Ltd.; East Texas Salt Water Disposal Company; Eiko Sekiyu K.K.; Elwerath Erdgas und Erdoel GmbH, Hannover; Elwerath Erdoel und Erdgas AG; Emirates National Chemicals Company Ltd.; Emori Sekiyu K.K.; Emsland-Erdoelleitung G.m.b.H.; Emulsions de Feyzin; Emulsions du Dauphine; Energie Marketing Service GmbH; Entrepot Petrolier de Mulhouse (E.P.M.); Entrepot Petrolier de L'Aveyron (E.P.A.); Erdgas-Verkaufs-Gesellschaft m.b.H.; Erdoel-Raffinerie Deurag-Nerag GmbH; Esso (Overseas) Pension Trust Limited; Esso Energie G.I.E.; Esso Exploration and Production Angola Inc.; Esso Exploration and Production Ireland Limited; Esso Lub'Services; Esso Malaysia Berhad; Esso Raffinage S.A.F.; Esso Resources Properties Inc.; Esso Societe Anonyme Francaise; Esso Standard Thailand Ltd.; Esso Standard Tunisie S. A.; Esso Technologies et Services (E.T.S.); Etablissements Cloarec; Exxon Asset Funding Company; Exxon Asset Management Company; Exxon Chemical Asset Management Company; Exxon Chemical France; Exxon Chemical Paraffins Limited; Exxon Chemical Polymeres SNC; Exxon Mobile Bay Partnership; Exxon de Colombia S.A.; F.T. Giken Kabushiki Kaisha; Federated Pipe Lines Ltd.; Ferngas Nordbayern G.m.b.H.; Ferngas Salzgitter

GmbH; Fernkaelte Geschaeftsstadt Nord G.b.R.; Flughafen Schwechat Hydranten-Gesellschaft; Fuji Kogyo K.K.; Full Cycle Plastics Pty. Ltd.; G16a (Groep) B.V.; Gasunie Engineering B.V.; General Bussan K.K.; General Highway K.K.; General Petrochemical Industries; General Sekiyu K.K.; General Sekiyu Okinawa Hanbai K.K.; General Sekiyu Overseas, Ltd.; General Shipping Co. Ltd.; General Unyu Kabushiki Kaisha; Geobutane - Lavera; Gewerkschaft Brassert Erdoel und Erdgas GmbH; Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH; Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH; Glen Park Gas Pipe Line Company Limited; Grande Ecaille Land Company, Inc.; Groupement Immobilier Petrolier; Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.); Groupement Petrolier Aviation; Groupement Petrolier de Nantes (G.P.N.); Groupement Petrolier de Saint-Pierre des Corps (G.P.S.P.C.); Groupement Petrolier de la Cote d'Azur; Groupement Petrolier du Finistere G.I.E.; Groupement Petrolier du Val-de-Marne (G.P.V.M.); Groupement d'Exploitation du Depot de Reception de Chennevieres (G.E.D.R.C.); Hambrecht & Quist Environmental Technology; Hamburger Gaswerke GmbH; Hannoversche Erdoelleitungs-G.m.b.H.; Hanshin Kyowa Sekiyu K.K.; Hayakawa Sekiyu K.K.; Heinrich Schneider Spedition GmbH; Hiroshima General Gas Juten Kabushiki Kaisha; Hoei Sekiyu K.K.; Hokkai Sanshi Co., Ltd. (Chemical); Hokushin Bussan K.K.; Hokuyu Sekiyu K.K.; Hong Kong Pumped Storage Development Company, Limited; Houston Regional Monitoring Corporation; Hydrant Refuelling System, S.A.; Hydranten-Betriebs-Gesellschaft, G.b.R.; Hydrierwerke Poelitz Aktiengesellschaft; Imperial Oil (an Ontario Partnership); Imperial Oil Limited; Imperial Oil Resources Limited; Imperial Oil Resources N.W.T. Limited; Imperial Oil Resources Ventures Limited; Imperial Oil Resources an Alberta limited partnership; Imperial Pipe Line Company, Limited, The; Inada Ekka Gas Kabushiki Kaisha; Industria Acqua Siracusana S.p.A.; Industry Promotion Enterprises Limited; Intoplane Services Company Limited; Iranian Oil Participants Limited (Iranian Consortium); Iranian Oil Services (Holdings) Limited; Iranian Oil Services Limited; Iraq Petroleum Company, Limited; Iraq Petroleum Pensions, Limited; Japan Butyl Company Limited; Japan Coal

Liquefaction Development Company, Ltd.; Jaymo SNC; Jersey Nuclear-Avco Isotopes, Inc.; K. K. Momose Shiojiri Stand; K. K. Toresen; K. K. Aizu General; K. K. Auto; K. K. Daimaru; K. K. Eastern Gas Terminal; K. K. General Sekiyu Hanbaisho; K. K. Genet; K. K. Genetech; K. K. Heian Sekiyu; K. K. Kyoei Shosha; K. K. Marugo Izumasa Shoten; K. K. Marutaka Sekiyu; K. K. Momose Sekiyu; K. K. Saidaiji Gas; K. K. Standard Sekyu Osaka Hatsubaisho; K. K. Toko; K. K. Uwano Sekiyu Shokai; K/S Statfjord Transport A/S & Co.; KX Industries, L.P.; Kabushiki Kaisha Sankyo Plastics; Kabushiki Kaisha Serubisu; Kai Tak Refuellers Company Limited; Kanto Kygnus K.K.; Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH; Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha; Keihan Sekiyu K.K.; Keiyo Sekiyu Hanbai K.K.; Kemcor Australia Pty. Ltd.; Kemcor Elastomers Ltd.; Kemcor Olefins Ltd.; Kemcor Plastics Pty. Ltd.; Kenya Petroleum Refineries Limited; Kibo Sekiyu Hanbai K.K.; Kimura Sekiyu Kabushiki Kaisha; Kinwa Sekiyu K.K.; Kobe Standard Sekiyu K.K.; Korea Perchem Company Limited; Kosxon Chemical Company Limited; Kowa Sekiyu K.K.; Kowloon Electricity Supply Company Limited; Kumho E.P. Rubber Co., Ltd.; Kygnus Ekika Gas Kabushiki Kaisha; Kygnus Kosan Kabushiki Kaisha; Kygnus Marketing Service K.K.; Kygnus Sekiyu K.K.; Kygnus Sekiyu Seisei Kabushiki Kaisha; Kygnus Trading Kabushiki Kaisha; Kyushu Eagle K.K.; L-Net East K.K.; L-Net West K.K.; L12A (Groep) B.V.; L14 (Groep) B.V., L15A (Groep) B.V.; L2 (Groep) B.V.; L5a (Groep) B.V.; LEAG Aktiengesellschaft fuer luzernisches Erdoel; Les Docks des Petroles d'Ambes; Liants Routiers de la Vallee de la Loir (LRVL); Lilac Sekiyu Kabushiki Kaisha; Lily Sekiyu K.K.; Lithcon Petroleum International (Bahamas) Inc.; Lithcon Petroleum Taiwan Inc.; Long Beach Oil Development Company; Lithcon Petroleum Taiway Inc.; Long Beach Oil Development Company; MEGAL FINCO; MEGAL Gmblt.; MESBIC Financial Corporation of Houston; Maasvlakte Olie Terminal N.V.; Magota Sekiyu K.K.; Mainline Pipelines Limited; Malaysian Energy Chemical & Services Sdn Bhd; Manchester Airport Storage and Hydrant Company Limited; McCann Plastics Inc. (Chemical); McColl-Frontenac Inc.; McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac Inc.; Meiji Sekiyu

K.K.; Metro Fuel Co. Ltd.; Mikawa Bussan K.K.; Mitake Unso K.K.; Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung; Mode Wheel Property Limited; Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee; Mount Thorley Coal Loading Limited; Mr. Lube Canada Inc.; Multi Tank Card B.V.; Mytex Polymers (General Partnership); N. V. Nedeerlandse Gasunie; Nam - K 14 B.V.; Nam - K 15 B.V.; Nam - K 7 B.V.; Nam - K 17 B.V.; NAM/CLOMS - K 8/K 11 B.V.; NAM/CLOMS - L 13 B.V.; NAM/dMOBIL M9a B.V.; NPC Services, Inc.; Nakabayashi Sekiyu K.K.; Nansei Oil Terminal K.K.; Nansei Sekiyu Kabushiki Kaisha; Nanseki Kaihatsu K.K.; Native Venture Capital Co. Ltd.; Near East Development Corporation; Nederlandse Aardolie Maatschappij B.V.; Neptune Bulk Terminals (Canada) Ltd.; New Cure, Inc.; Newcastle Coal Shippers Pty. Limited; Nichiei Kogyo Kabushiki Kaisha; Nichimo Oil (Bermuda) Co., Ltd.; Nikko Sangyo K.K.; Nippon Unicar K.K.; Nisku Products Pipe Line Company Limited; Nissei Sekiyu Kabushiki Kaisha; Nogat B.V.; Norddeutsche Erdgas-Aufbereitungs G.m.b.H.; Norddeutsche Mineraloelwerke Stettin G.m.b.H.; Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung; Noroxo; Northward Developments Ltd.; OSLO Alberta Limited; Office Prive d'Assurances et de Courtages; Oil Field Chemicals Company (Saudi Arabia) Ltd.; Oil Service Company of Iran (Private Company); Oil Spill Response Limited; Oldenburgische Erdoel Gesellschaft m.b.H.; Oleoducto de Colombia S.A.; Oleoductos Canarios, S.A.; Osaka General Gas K.K.; Osaka Kygnus K.K.; P. T. Stanvac Indonesia; P.A.C. S.A.R.L. (Pinson-Allegret-Causse); PIMEC Inc.; Pacesetter Enterprises Limited; Pars Investment Corporation; Paxon Polymer Company, L.P.; Peninsula Electric Power Company Limited; Petroleum Services (Middle East) Limited; Petrosvibri S.A.; Pier Atlantic Limited; Pipe Line Services, Inc.; Plantation Pipe Line Company; Portland Pipe Line Corporation; Primaeroel GmbH; Primus a.s.; Prince William Sound Oil Spill Response Corporation; Progas Limited; Projectbureau W/K B.V.; Quadrant Gas Limited; Raffinerie du Midi S.A.R.L.; Rainbow Pipe Line Company, Ltd.; Redwater Water Disposal Company Limited; Refineria Petrolera Acajutla, S.A.; Regulus Holding

(Singapore) Pte. Ltd.; Rheingas Erdgasleitungs-Gesellschaft m.b.H.; Rotterdam Antwerpen Pijpleiding (Belgie) N.V.; Rotterday-Antwerpen Pijpleiding (Nederland) N.V.; Rubiatec Sendirian Berhard; Ruhrgas Aktiengesellschaft; S.A. du Pipeline a Produits Petroliers sur Terriroire Geneve (SAPPRO); SEAG Aktiengesellschaft fuer schweizerisches Erdoel; SERAM S.p.A.; SOVEXOIL Oil Field; Saitama Sekiyu Hanbai K.K.; Sanyo Sekiyu K.K.; Saraco S.A.; Saudi Arabian Lube Additives Company Limited; Schubert KG; Seismic Industries A/S; Senboku Oil Kikoh K.K.; Senpoku Oil Service K.K.; Servacar Ltd.; Shehtah Drilling Limited; Shimoyama Sekiyu K.K.; Shin-Nihon Yukagaku Kogyo K.K.; Shinohara Oil K.K.; Sigel Corporation; Smiley Gas Conservation Limited; Sociedad Nacional de Oleoductos Ltda.; Sociedad de Inversiones de Aviacion; Societa Italiana per l'Oleodotto Transalpino S.p.A.; Societa per Azioni Raffineria Padana Olii Minerali-SARPOM; Societe "Geomines-Caen"; Societe Anonyme "Produits Lubrifiants de Madagascar" - PROLUMA S.A.; Societe Anonyme de Gestion de Stocks de Securite (SAGESS); Societe Anonyme de la Raffinerie des Antilles; Societe Anonyme des Hydrocarbures; Societe Civile de Mustapha Algerie; Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI); Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep; Societe Francaise EXXON CHEMICAL; Societe Havraise de Manutention de Produits Petroliers; Societe Ivoirienne d'Operations Petroliers S.A.; Societe Malgache de Raffinage; Societe Paris-Manche; Societe Paris-Niel; Societe Reunionnaise d'Entreposage; Societe d'Etude et d'Exploitation de la Raffinerie du Tchad - S.E.E.R.A.T.; Societe d'Exploitation & de Developpement d'Operations Commerciales; Societe d'Exploitation des Garages les Stations Tour Eiffel; Societe de Manutention de Carburants Aviation (S.M.C.A.); Societe de Promotion et de Financement Touristique (CARTHAGO); Societe de la Raffinerie d'Alger; Societe des Pipe-Lines de Strasbourg; Societe des Transports Petroliers par Pipe Line; Societe du Caoutchouc Butyl (SOCABU); Societe du Pipe Line de la Raffinerie de Lorraine; Societe du Pipe-Line Mediterranee-Rhone; Societe du Pipeline Sud-Europeen; Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij); Southern Natural Gas Development

Pty. Ltd.; Spintek Systems, L.P.; Standard Kaihatsu K.K.; Standard Kosan Kabushiki Kaisha; Standard Service K.K.; Stansted Fuelling Company Limited; Statfjord Transport A/S; Stockage Geologique de Gaz de Lavera; Sueddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung; Sun East (Dublin) Company, Ltd.; Sun East Company Ltd; Superior Disk Corporation; Syncrude Canada Ltd.; Synergistics Industries (NJ) Inc.; Synergistics Industries (TX) Inc.; Synergistics Industries Limited; TAR-Tankanlage Ruemlang AG; TBN Tanklager-Betriebsgesellschaft Nuernberg mbH; TCA Plastics Inc.; TFS Turbo Fuel Services GmbH, Hamburg; TGF Tankdienst Gesellschaft Frankfurt G.b.R.; TGM Tankdienst-Gesellschaft Muenchen GbR; TIBA Speditions GmbH; TLS Tanklager Stuttgart GmbH; Taihei Bussan K.K.; Taisei Kogyo Sekiyu Hanbai K.K.; Taketsuru Yugo K.K.; Tankanlage A.G., Mellingen; Tanklager Altishausen A.G.; Tanklager Taegerschen AG; Tanklager-Gesellschaft Tegel G.b.R.; Tanklagergesellschaft, Koeln-Bonn G.b.R.; Tecnica Quimica Petrolera, S.A. de C.F.; Terminal Petrolier de Bordeaux (T.P.B.); Thai Aliphatics Company Limited; Thai C-Center Company Limited; Thai Petroleum Pipeline Co., Ltd.; Thyssengas G.m.b.H.; Tohpren Co., Ltd. (Chemical); Tojo Gas K.K.; Toko Sekiyu K.K.; Tonen Chemical Nasu Co., Ltd.; Tonen Energy International Corp.; Tonen Energy and Marine (Singapore) Pte. Ltd.; Tonen Filare Co. Ltd.; Tonen Film Company Limited; Tonen Kabushiki Kaisha; Tonen Kagaku K.K.; Tonen Properties Inc.; Tonen Sogo Service Co., Ltd.; Tonen System Plaza Kabushiki Kaisha; Tonen System Service Kabushiki Kaisha; Tonen Tanker Kabushiki Kaisha; Tonen Tapyrus Company Limited; Tonen Technology K.K.; Tonex Company Limited; Towa Compounding Co., Ltd.; Towa Sekiyu K.K.; Toyo Gas K.K.; Toyoshina Film Company, Ltd.; Trans-Northern Pipelines Inc.; Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.; Transgaz Lavera; Tsurumaru Unyu K.K.; Turkish Petroleum Company, Limited; UBAG - Unterflurbetankungsanlage Flughafen Zurich; Ulan Coal Mines Limited; United Industry Development Co., Ltd.; Van Salt Water Disposal Company; Verbundnetz Gas AG; Wako Jushi Kabushiki Kaisha; Warmtepomp Nederland B.V.; Westdeutsche Erdoelleitungs-G.m.b.H.; Westgas G.m.b.H.; Winnipeg Pipe Line Company

Limited; Woodbine Marketing Co., Inc.; Worex S.N.C.; Yasaka Sekiyu K.K.; Yellowstone Pipe Line Company; Yoshimi Gas Kabushiki Kaisha; Yuai Sekiyu K.K.; Zenon Environmental Systems Inc. (ZESI).

The parent company of respondent Marathon Oil Company is USX Corporation. Marathon Oil Company has the following subsidiaries (except wholly owned subsidiaries): Arctic LNG Transportation Company; Badger Pipe Line Company; Colonial Pipeline Company; Cook Inlet Pipe Line Company; Eagle Sun Company Limited; Explorer Pipeline Company; Gravcap, Inc.; Green Bay Terminal Corporation; Kenai LNG Corporation; Locap Inc.; Loop Inc.; Oil Insurance Limited; Old Main Assurance Ltd.; Platte Pipe Line Company; Polar LNG Shipping Corporation; Tops Insurance Limited; Triad Terminal Company of Selma; Wake Up Oil Co., Inc.; West Shore Pipe Line Company.

The parent of respondent Mobil Oil Corporation is Mobil Corporation. Mobil Oil Corporation has the following subsidiaries (except wholly owned subsidiaries): Atas Anadolu Tasfiyehanesi A.S.; Canner's Steam Company, Inc.; Collins Pipeline Company; Felix Oil Company; Mobil Oil de Mexico, S.A. de C.V.; Mobil Oil Guinee; Mobil Oil Nigeria Public Limited Company; Mobil Tunise; Near East Development Corporation; and T&M Terminal Company.

The parent corporations of Shell Oil Company are Shell Petroleum, Inc.; Royal Dutch Petroleum Company; and the "Shell" Transport and Trading Company. Shell Oil Company has the following subsidiaries (except wholly owned subisdiaries): Agripro Biosciences Inc.; Pecten Middle East Services Company; Saudi Petrochemical Company; CRI International, Inc.; CRI Far East Trading Company Limited; CRI Europe S.A.; Catalyst Recovery Europe S.A.; Catalyst Technology Europe S.A.; CRI-SAM, Ltd.; Nippon CRI, LTD.; Pecten Angola Ltd.; Pecten Angola Exploration Ltd.; Pecten Bolivia Ltd.; Pecten Cameroon Company; Pecten Indonesia Misool Ltd.; Pecten Portugal Company S.A.R.L.; Pecten Suriname Ltd.; Taranaki Offshore Petroleum Company Limited; Cortez Capital Corporation, Shell Frontier Services Inc., Butte Pipe Line Company and Premix/E.M.S. Inc.